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No. 97-1337, 97-1356 and 97-1357

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

COUNTY OF AITKEN, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

JOHN W. THOMPSON, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

COUNTIES' REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondents' Removal Act Arguments Fail to Recognize the President's Constitutional and Statutory Authority.

The Respondents build a straw man arguing that the Removal Act of 1830 (4 Stat. 411) did not provide the President authority to revoke the treaty privilege.

The argument overlooks the constitutional and other statutory sources of the President's power here, including the Treaty to which the Chippewa had consented. This is especially important since numerous other treaty provisions and executive orders of this era are implemented through this broader Presidential power.

Laurence H. Tribe in his *American Constitutional Law* (2d ed. 1988) analyzes Article II, the Executive power, which includes inherent and "implied" power, in addition to authority delegated by Congress. (Tribe, *supra*, § 4-2 at 211). Though Professor Tribe discusses foreign affairs, Article II provides the President power in the area of Indian affairs which is analogous, especially during the historical period in question.[1]

There are two constitutional bases. Major policy was implemented through the President's shared article II "power, by and with the consent of the Senate, to make treaties . . . " U.S. Const. art. II, § 2. The President is also made "commander-in-chief of the army . . . of the United States" by Article II § 2. Indian affairs were administered

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[1] Until Congress barred treaty-making with Indian tribes in 1871, Act of March 3, 1871, 16 Stat. 566.

through the Army in this historical period. Thus, President acted in a dual role, both explicitly authorized by the Constitution, to negotiate and to administer treaties.

A constitutionally shared power may be delegated to the President "more broadly than it could where its (Congress' delegated) power as enumerated in Article I defines the totality of federal authority." (Tribe, p. 212, *citing United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). Congress did explicitly so delegate broad power over Indians, e.g., 2 U.S.C. § 2, § 9; the latter of which, first enacted in the 1830s, provides:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

2 U.S.C. § 9.

The President had power to totally extinguish the Indians' claims to the land. The President also had the lesser-included power to allow any hunting or fishing privileges and provide that such could be conditioned or limited in duration.

Any question of presidential authority here is finally resolved by the fact that Congress ratified the Treaty of 1837, including the explicit "at the pleasure of the President of the United States" limitation on the privilege.

Both Respondents repeat the claim that the Chippewa consent was not obtained. However, the Chippewa signed the 1837 Treaty (and accepted benefits) after explanation that their use of the ceded lands would be terminable – "temporary" as the President of the United States called it, when revoking. (*See* Treaty Minutes,

quoted below at p. 7.) Later treaties of 1854 and 1855 provided reservations for permanent homes and the Indians consented to relocating to these reservations.

2. These "Privileges" Admittedly Did Not Continue on Private Lands; They are Temporary Like the Rights in *Repsis* and *Race Horse*.

A key weakness in Respondents' argument is the admission these treaty privileges have long lapsed at least as to private lands. Trying to minimize the importance of this case, the Chippewa Respondents' brief claims that acreage figures for the 1837 Treaty area overstate the *affected* lands since only a fraction of the land is open for treaty use; "public lands and those private lands that are open to public hunting and fishing by operation of state law." (Chippewa Resp. Br., p. 3 and n. 4). Respondents then provide a lowered acreage estimate of public lands, in an effort to minimize the impact of this judgment.

This reflects the Circuit rejection of the Bands' cross-appeal which had sought to extend the privilege to more (most) private lands. App. 70-71. More importantly, this shows that the treaty privilege no longer extends to *all* lands. When lands became private, the treaty right of access terminated. As to such lands, the privilege was temporary.

The conservation impact on natural resources is worsened, however, since the resources allocated include *all* resources from *all* lands and waters in the Minnesota treaty area. Indeed fish production from boundary waters, such as Mille Lacs Lake, outside the ceded area was even included in the allocation. (*Mille Lacs Band of*

Chippewa Indians v. Minnesota, 952 F. Supp. 1362 (D. Minn. 1997); App. 103-104.)

The Chippewa Respondents argue that the Eighth Circuit distinguished the rights at issue in *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 116 U.S. 1851 (1996), and *Ward v. Race Horse*, 163 U.S. 504 (1896), from those in the 1837 Chippewa Treaty because "the latter are *not* limited to 'unoccupied' lands and *not* dependent on the United States retaining title . . . [and thus] temporary and precarious . . . but instead were intended to be continuing rights." Chippewa Resp. Br. at p. 19.

The United States Respondent, more succinctly, argues: "The court of appeals applied Race Horse's continuing/temporary distinction." (U.S. Resp. Br., p. 12.) The United States paraphrases the conclusion "the Chippewa's treaty rights (sic) . . . were intended by the parties to be continuing rights." (U.S. Resp. Br., p. 12.) As to private lands, this is just wrong.

The circuit court rejected the Bands' cross-appeal and concluded that the privilege has terminated as to private land; there was no access right for treaty hunting, fishing or ricing to such lands. App. 70-71. This holding is unchallenged, as there was no cross-petition.

This conclusion there is no right on private land contrasts remarkably with the one decision of this Court on which both Respondents rely, *United States v. Winans*, 195 U.S. 371 (1905), cited U.S. Resp. Br. at pp. 10, 13, 14, Chippewa Resp. Br. at 20. That *Winans* case expressly held there *was* a continuing access right over private lands.

Ironically, the exception under the decision below is that a *state* law opening private lands to hunting and fishing apparently may renew the privilege as to such lands.

As to the majority of lands in Minnesota which were ceded in 1837 (nearly 85% by the Chippewa Respondent calculation), the privilege was temporary and does not extend to those lands.

The contrary conclusion that the privilege was permanent or "continuing" as to public lands disregards not only the express revocation but the conclusion and characterization of the U.S. President. In the 1850 order – President Taylor expressly referred to the privilege as "temporary" while revoking it: "The privileges granted *temporarily* to the Chippewa . . . are hereby revoked." App. 253, emphasis added. This Court recently held a Presidential proclamation to reveal the contemporaneous understanding:

> This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive. . . . " *Rosebud*, 430 U.S. at 602-603.

South Dakota v. Yankton Sioux Tribe, 66 U.S.L.W. 4092, 4099 (1998). The language of the 1850 Order is surely persuasive as a nearly contemporaneous pronouncement by the President. In *Hagen v. Utah*, 510 U.S. 399, 420 (1994), an Order of President Roosevelt was "clear evidence of the understanding at the time."

The contradictory suggestion by both Respondents that the Indians understood the privilege to be permanent is also flatly contradicted by the express rejection of

Indian negotiators' proposal to lease the land to the United States and retain long-term use. As reflected in the 1837 Treaty Journal, *e.g.*, the U.S. negotiators responded: "Your Great Father never buys land for a term of years" but "it will probably be many years . . . Before your great father will want all these lands for the use of his white children." 1837 Treaty Journal 149.

3. The Eighth Circuit Conflicts with the Tenth Circuit which Had Faithfully Implemented this Court's Decisions.

While claiming this decision may be reconciled with the Tenth Circuit's *Repsis* and this Court's *Race Horse* on which that Circuit relied, the United States includes a lengthy footnote questioning "the continued vitality of *Race Horse's* rationale," (U.S. Resp. Br., p. 13, n. 3) and suggest this Court's decision has been "modified by implication" or "entirely discredited." To the contrary, this Court has cited to the *Race Horse* decision over 20 times, including recently.[2]

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[2] *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 773 n. 23 (1985); *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 179 (1980) (Rehnquist concurrence and dissent), *reh'g denied*, 448 U.S. 911 (1980); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 682 n. 25 (1979); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412, n. 12 (1968); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Tulee v. Washington*, 315 U.S. 681, 683, n. 2 (1942); *Board of County Comm'n v. United States*, 308 U.S. 343, 354 n. 5 (1939) (Black concurrence); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70 n. 6 (1928); *LaCoste v. Department of Conservation*, 263 U.S. 545,

As the Tenth Circuit noted:

> [W]e view *Race Horse* as compelling, well-reasoned, and persuasive. Also, contrary to the Tribe's views, there is nothing to indicate that *Race Horse* has been "overruled, repudiated or disclaimed." *Race Horse* is alive and well.

Repsis, 73 F.3d at 994. The U.S. Respondent's argument to the contrary actually reflects the Eighth Circuit Court's refusal to apply this Court's ruling and conflicts with the Tenth Circuit.

4. The Eighth Circuit Court Approved Resource Allocation While Refusing to Apply This Court's Moderate Living Standard.

Both Respondents would mislead this Court into believing there is no allocation of resources here (U.S. Resp. Br. at 26: "no need existed, as in *Fishing Vessel* [*Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979)], for a judicial allocation." Chippewa Brief at 24: "There is no court order allocating 50 percent of the resources to Bands." However, the Eighth Circuit admitted an allocation has occurred:

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549 (1923); *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 83 (1922); *Ruddy v. Rossi*, 248 U.S. 104, 109 (1918) (Holmes dissent); *John Bund Brewing Co. v. Great N. Ry. Co.*, 246 U.S. 651 at 651 (1917); *Virginia v. West Virginia*, 246 U.S. 565, 593 (1917); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562 (1915); *McCabe v. Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 159-60 (1914); *Ex Parte Webb*, 225 U.S. 663, 683, 690 (1911); *Coyle v. Smith*, 221 U.S. 559, 573 and 576 (1910); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Bollin v. Nebraska*, 176 U.S. 83, 88 (1900).

> The Conservation Code and Management Plan they have drawn up *is in effect an allocation of resources between treaty and nontreaty harvesters*. It is understandable that the Counties and Landowners, neither of which was a party to the stipulation agreeing to the Code and plan, dispute *the de facto* allocation made therein.

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997), App. 65, emphasis added.

The district court even more also expressly acknowledged the allocations approved in the Plan:

> The Bands have further agreed that their quotas [of big game] will not exceed 50% of the harvestable surplus in any permit unit . . .
>
> . . . [as to fish] the treaty harvest is subject to a 50% ceiling . . . [but the] Management Plan . . . set the Band's quotas well below 50%.[3]

952 F. Supp. at 1381-88, App. 116, 137.

Note the allocations are "phased in" and annually increase. Also, the allocations deal with resource production from the *entire* 1837 ceded area, though the Band hunting is allowed – and concentrated – only on the much smaller portion of public and some private lands.

Conservation of these natural resources may only be assured by restriction of other citizens hunting and fishing in an amount at least equal to the harvest of the Bands. Since the Bands have become relatively wealthy

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[3] This appears in the section of the opinion approving Bands killing deer by "shining" over bait at night.

from casino gambling, the "moderate living" doctrine should be considered before such draconian results.

The result, as the circuit court admitted is at least "de facto" allocation (approved by court order), which may be converted to *de jure* under continuing jurisdiction whenever the State resists Bands' demands.

5. This Case is An Attack on the President's Authority.

The U.S. Respondents object that "The Counties' argument is predicated on a mischaracterization of this case as involving a judicial challenge against a President" and "The Counties cite no authority holding that federal courts . . . cannot adjudicate the scope or validity of Executive orders. . . . " (U.S. Resp. Br., p. 21.)

Dalton v. Specter, 511 U.S. 462 (1994), is the most recent such case (cited in Counties' Petition, pp. 13-15). Like this case, *Dalton* was ostensibly against other defendants but ultimately sought to invalidate a *Presidential* decision:

> In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

511 U.S. at 471.

The court below necessarily curiously "transmuted" this case into one considering the reviewability of the Presidential Order of 1850, ultimately holding President Taylor's Order "unlawful." In *Dalton*, this Court succinctly answered:

> But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

Dalton, 511 U.S. at 474.

* * *

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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